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IN THE

Supreme Court of the United States

October Term, 1943

No. 339

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE TIMES-MIRROR COMPANY,

Respondent.

BRIEF OF RESPONDENT THE TIMES-MIRROR COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT THE TIMES-MIRROR COMPANY[1] IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

POINT I.

There Is No Conflict of Federal Court Decision in Interpretation of the Term "Employee" as Used in the National Labor Relations Act and Other Cognate Social Legislation.[1]

A. In the Absence in the Act of Comprehensive Definition of the Term "Employee", Courts Will Apply the Ordinary and Conventional Meaning Ascribed at Common Law and by the Courts to Cognate Social Legislation.

(1) Except as Congress has written into the Act different standards, the federal rules protecting the federal

[1]The Times-Mirror Company is the corporate name of organization publishing the Los Angeles Times.

rights created by the Act are fashioned from the common law.

Bailey, Adm'x v. Central Vermont Railway, Inc., (May 24, 1943) ..... U. S. ....., 63 S. Ct. 1062:

"The rights which the Act [Federal Employers' Liability] creates are federal rights protected by federal rather than local rules of law (citing authorities). And those federal rules have been largely fashioned from the common law (citing authorities) except as Congress has written into the Act different standards (citing authorities)." (63 S. Ct. 1063-1064.)

(2) The legislative authority uses words in their ordinary sense and with the meaning commonly attributed to them.

Keppner v. United States, 195 U. S. 100, at 124:

"It is a well-settled rule of construction that language used in a statute which has a *settled and well-known meaning, sanctioned by judicial decision*, is presumed to be used in that sense by the legislative body."

United States v. First National Bank, 234 U. S. 245, at 258:

"That this *natural and usual signification* of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant, is an *elementary* rule of construction frequently recognized and followed in this court."

United States v. Merriam, 263 U. S. 179, at 187:

"The word 'bequest' having the *judicially settled meaning* which we have stated, we must presume it was used in that sense by Congress."

Lynch v. Alworth-Stephens Co., 267 U. S. 364, at 370:

"And the *plain, obvious and rational meaning* of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Von Weise v. Commissioner of Internal Revenue (8 C. C. A.) 69 F. (2d) 439, at 441, certiorari denied 292 U. S. 655:

"One of the cardinal rules for construing statutes is that the words used are to be given their *common, ordinary meaning* in the absence of indication in the statute or in the surrounding circumstances to the contrary; but, if a definition of the word is given in the statute, that definition is controlling."

McDonald v. United States (8 C. C. A.), 89 F. (2d) 128, at 133, certiorari denied 301 U. S. 697:

"* * * it is well-settled that, when a statute uses words whose meaning under judicial decisions has become *well-known and well-settled, it will be presumed* that the Legislature used such words in the sense justified by long judicial sanction."

Sanborn v. Commissioner (8 C. C. A.), 88 F. (2d) 134, at 137, certiorari denied 301 U. S. 700:

"* * * 'the *plain, obvious and rational meaning* of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover,' has received the approval of the Supreme Court, and is now well settled."

Hearst Publications, Inc., et al. v. National Labor Relations Board, 136 F. (2d) 608, at 612 [R. p. 1848]:

"Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by the context of a statute."

(3) This presumption must be indulged by the courts.

Levy's Lessee v. M'Cartee, 6 Peters (31 U. S.) 102, 110:

"The legislature *must be presumed* to use words in their *known and ordinary* signification unless that sense be repelled by the context."

Maillard v. Lawrence, 16 How. (57 U. S.) 251:

"The *popular or received import* of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large."

Lake County v. Rollins, 130 U. S. 662, at 670-671:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, *the first resort*, in all cases, is to the *natural signification* of the words, in the order of grammatical arrangement in which the framers of the instrument have placed

them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, *must be accepted*, and neither the courts nor the legislature have the right to add to it or take from it. * * * So, also, where a law is *expressed in plain and unambiguous terms*, whether those terms are general or limited, the *legislature should be intended* to mean what they have plainly expressed, and consequently no room is left for construction."

Old Colony R. Co. v. Commissioner, 284 U. S. 552, at 560-561:

"'The legislature *must be presumed* to use words in their *known and ordinary signification*.' *Levy's Lessee v. McCartee*, 6 Pet. 102, 110. 'The *popular or received import* of words furnishes the general rule for the interpretation of public laws.' *Maillard v. Lawrence*, 16 How. 251, 261. And see *United States v. Buffalo Gas Co.*, 172 U. S. 339, 341; *United States v. First Nat. Bank*, 234 U. S. 245, 258; *Caminetti v. United States*, 242 U. S. 470, 485. As was said in *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370, 'the *plain, obvious and rational meaning* of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' * * *

"* * *, *In common parlance* the bonded indebtedness of a corporation imports the total face of its outstanding bonds,—the amount which must be paid at their maturity. The phrase is not generally used to connote par plus an unreturned proportion of premium.

"And as respects 'interest,' the *usual import* of the term is the amount which one has contracted to pay for the use of borrowed money. * * * We cannot believe that Congress used the word having in mind any concept other than the *usual, ordinary and everyday meaning of the term,* * * *."

Hearst Publications, Inc., et al, v. National Labor Relations Board, 136 F. (2d) 608, at 612 [R. p. 1848]:

"Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments."

B. Congress Did Not Give a Comprehensive Definition of the Term "Employee" in:

1. *Social Security Act,* August 10, 1939, c. 666, Title IX, Sec. 905(a), 53 Stat. 1400; 42 U. S. C. A., Sec. 1011(b).

"The term 'employment' means any service of whatever nature performed within the United States by an employee for his employer, except—agricultural * * * domestic, * *, *." (8 exceptions.)

2. *Federal Employers' Liability Act,* 53 Stat. 1404, August 11, 1939, c. 685, Sec. 1; 45 U. S. C. A. Sec. 51.

"Every common carrier * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * *."

3. *Fair Labor Standards Act,* 52 Stat. 1060, June 25, 1938, c. 676, Sec. 3; 29 U. S. C. A. Sec. 203.

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.

"'Employee' includes any individual employed by an employer."

4. *Federal Safety Appliance Act*, March 2, 1893, c. 196 and amendments; 27 Stat. 531; 45 U. S. C. A. Secs. 1-46. Apparently an entire absence of definition.

5. *Merchant Marine Act*, 41 Stat. 1007, June 5, 1920, c. 250, Sec. 33; 46 U. S. C. A. Sec. 688.

"Any seaman who shall suffer a personal injury in the course of his employment may, at his election, maintain an action for damages at law * * *."

6. *Longshoremen's and Harbor Workers' Compensation Act*, March 4, 1927, c. 509, Sec. 2, 44 Stat. 1424; 33 U. S. C. A. Sec. 902.

"The term 'employee' does not include a master or member of a crew of any vessel nor any person engaged * * * to load or unload * * * any small vessel * * *.

"The term 'employer' means an employer any of whose employees are engaged in maritime employment * * *."

7. *National Labor Relations Act*, July 5, 1935, c. 372, Sec. 2, 49 Stat. 450; 29 U. S. C. A. 152(3).

"The term 'employer' includes any person acting in the interest of an employer directly or indirectly * * *.

"The term 'employee' shall include any employee * * * but shall not include" an agricultural laborer, domestic servant, child or spouse.

C. In Each Instance the Courts Have Declared That Congress Used the Word in Its Ordinary Sense and Intended to Describe the Conventional Relation of Employer and Employee.

1. SOCIAL SECURITY ACT.

Anglim v. Empire Star Mines Co. (9 C. C. A.), 129 F. (2d) 914, 916-917:

"Applying the ordinary legal tests as the statute appears to have intended, the trial court concluded that the Leasers were independent contractors. * * * However, in defining the required relationship * * * the regulations do no more than reiterate the familiar principles of the common law."

Williams v. U. S. (7 C. C. A.), 126 F. (2d) 129, 132 (certiorari denied, 317 U. S. 655):

"It has been held by this and other courts that employment within the meaning of the statute connotes the legal relationship of employer and employee as those terms were defined and understood at the time of the enactment—furthermore, that an independent contractor is not an employee."

U. S. v. Griswold (1 C. C. A.), 124 F. (2d) 599, 601:

"We held that 'an employee is one who meets the test of the more or less established concept of the "legal relationship of employer and employee." * * *

"The relationship of employer and employee in the ordinary sense does not exist here."

Deecy Products Co. v. Welch (1 C. C. A.), 124 F. (2d) 592, 597:

"* * * The words 'employ', 'employer' and 'employee' are to be taken in their ordinary meaning.

It seems clear that the question whether a person is an employee in all cases turns on the existence of the more or less established concept of the 'legal relationship of employer and employee'."

Jones v. Goodson (10 C. C. A.), 121 F. (2d) 176, 180:

"It must be presumed that Congress was cognizant of its well-established principles at the time of the enactment of the statute and that if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the act or its legislative history which indicates such an intent."

Indian Refining Co. v. Dallman (7 C. C. A.), 119 F. (2d) 417:

"There is nothing in the Social Security Act which suggests that the terms 'employer' and 'employee' should receive anything but their *ordinary construction.*"

(31 F. Supp. 460.)

2. FEDERAL EMPLOYERS' LIABILITY ACT.

Robinson v. B. & O. R. R., 237 U. S. 84, 94:

"We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their *natural* sense, and intended to describe the *conventional* relation of employer and employee."

Hull v. P. & R. Ry. Co., 252 U. S. 475, 479;

Wells Fargo v. Taylor, 254 U. S. 175, 187.

3. FAIR LABOR STANDARDS ACT.

Bowman v. Pace Co. (5 C. C. A.), 119 F. (2d) 858, 860:

"The strongly contested issue is whether he was an employee of the Pace Company at all. * * * It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, * * *."

4. FEDERAL SAFETY APPLIANCE ACT.

Stevenson v. Lake Terminal R. Co. (6 C. C. A.), 42, F. (2d) 357, 358-359:

"The Congressional failure to define the term 'employee' * * * has evoked a large amount of litigation. * * * and the Supreme Court has held that the term 'employee' in the Employers Liability Act describes the *conventional* relation of master and servant."

5. MERCHANT MARINE ACT.

Loe v. Goldstein (9 C. C. A.), 101 F. (2d) 967, 971:

"It is evident that an injured seaman is granted a cause of action by the foregoing section only against one as to whom he occupies the *conventional* relationship of 'employee'."

6. LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

Cardillo v. Mockabee (C. C. A. D. C.), 102 F. (2d) 620, 622:

"There is nothing in the act to destroy the common law meaning of 'independent contractor'."

7. NATIONAL LABOR RELATIONS ACT.

Hearst Publications, Incorporated v. National Labor Relations Board, 136 F. (2d) 608, 611-612 [R. pp. 1843-1852]:

"The Act does not specifically define either the term 'employer' or the term 'employee,' but says simply 'the term "employee" shall include any employee.' Since the Act contains no precise definitions, the publishers contend that Congress intended to use the words in their ordinary and conventional sense as understood at the time the statute was enacted." [R. p. 1847.]

"Since the term 'employee' is not defined in the Act, we agree with petitioner's contention that it must be given its conventional meaning as developed under the common law and statutory enactments." [R. p. 1848.]

D. That Congress Used the Term "Employee" in the National Labor Relations Act in Its Natural and Conventional Sense Is Persuasively Indicated by (1) Language of the Act; (2) Rules and Regulations Implementing National Labor Relations Act; and (3) Decisions and Orders of the National Labor Relations Board in the Houston Newsboys Case and in the Case at Bar.

(1) LANGUAGE OF THE ACT.

(a) *Definitions* (29 U. S. C. A., Sec. 152):

"When used in Sections 151-166 of this Title—

(2) the term 'employer' includes any person acting in the interest of an employer directly or indirectly. (*exclusions then stated*) * * *.

(3) the term 'employee' shall include any employee and shall not be limited to the employees of a particu-

lar employer unless the chapter explicitly states otherwise (*inclusions and exclusions then stated*) * * *."

(b) *Rules and Regulations* (29 U. S. C. A., Sec. 156):

"The Board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of Sections 151-166 of this Title."

(2) RULES AND REGULATIONS OF BOARD IMPLEMENTING NATIONAL LABOR RELATIONS ACT.

(a) *Definitions* (29 U. S. C. A., App. p. 561):

"Sec. 201.1. Terms Defined in Section 2 of the Act. The terms * * * 'employer,' 'employee,' * * * as used herein shall have the meaning set forth in Section 2 of the National Labor Relations Act, * * *."

(3) DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD IN THE HOUSTON NEWSBOYS CASE AND IN THE CASE AT BAR.

(a) *In the Matter of Houston Chronicle Publishing Co. and Houston Newsboys Union, Local 456, 28 N. L. R. B. 1043.*

Although no specific mention is made in the opinion of the interpretation given the term "employee" in the National Labor Relations Act, the recital of the controlling facts of record and the finding of the Board that these facts indicate these "newsboys are not 'employees' within the meaning of the Act" definitely indicates that the Board was construing the term in its legal, natural and conventional meaning.

(b) *Decision and Direction of Elections in Case at Bar.*

"Section 2(3) of the Act provides in part: 'When used in this Act—(3) the term "employee" shall include any employee * * *'. In cases where the status of an individual was challenged we have indicated that the statutory definition of the term 'employee' *embraces all employees in the conventional as well as legal sense, except those by express provision excluded* and that the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared *policy and purposes of the Act* comprehend securing to the individual the rights guaranteed and protection afforded by the Act."[2] [R. 108-109, footnote 33.]

E. The Decision in the Case at Bar Does Not Conflict With

1. *Walker v. Altmeyer* (C. C. A. 2), July 12, 1943.
2. *Gray v. Powell*, 314 U. S. 402.

1. WALKER V. ALTMEYER (SUPRA).

The proceeding was under the Social Security Act. Heretofore (Point I-C) are cited several cases construing the term employer and employee as used in that act. There is no intimation in the *Altmeyer* case of disagreement with any of these prior decisions from the various circuits. It may not be assumed when one reads the names of the circuit judges participating in the opinion that all were unmindful of these several former decisions.

The *Altmeyer* case relies upon and cites only *Gray v. Powell (supra)*.

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[2]This language of the Board's decision was quoted in the opinion of the Circuit Court of Appeals (136 F. 2d. 608, 612 [R. 1847]).

2. GRAY V. POWELL (SUPRA).

The Seaboard Air Line Railway Company became lessee of certain coal lands and mined the coal through an independent contractor. All the coal was consumed by the railroad. Under the Bituminous Coal Act of 1937 (15 U. S. C. A. Secs. 828 *et seq.*), producer-consumers of coal were exempted from its provisions. Section 4-A of the Act set up machinery for obtaining exemptions. Receivers of the Railway Company, claiming that the railroad was a producer as well as consumer of coal, filed an application under Section 4-A for exemption from the Act. The exemption was denied. On review by the Circuit Court of Appeals the order was reversed (*Powell v. Gray*, 114 F. (2d) 752). Certiorari was granted (311 U. S. 644) and the decree below affirmed by an equally divided court (312 U. S. 666). Subsequently a petition for rehearing was granted (313 U. S. 596). On rehearing this court reversed the judgment of the Circuit Court of Appeals (314 U. S. 402).

This court, after quoting Section 4-A of the Act, said:

> "In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by Sections 4-II(1) and 4-A, the function of review placed upon the courts by Section 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner.
> * * *
>
> "Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual

exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable, adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other."

314 U. S. 411-412.

Continuing, the court said:

"Just as in the *Adkins* case [310 U. S. 381] the determination of the sweep of the term 'bituminous coal' was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of 'producer'."

314 U. S. 412-413.

The Supreme Court, however, examined the facts, pointing out that

"If independent contractors are employed for extraction, there is an obvious breach in the full consumer-producer identity. This may create consequences which would not follow if the enterprise itself, through its own employees, accomplished the same ultimate result."

314 U. S. 413.

The principle involved in *Gray v. Powell* is explained and applied in the opinions of this court in:

Sunshine Coal Co. v. Adkins, 310 U. S. 381.

and

Shields v. Utah Idaho Central R. Co., 305 U. S. 177.

Sunshine Coal Co. v. Adkins (supra). This case involved the Bituminous Coal Act of 1937.

> "Machinery is provided in Section 4-A [of said Act] for obtaining exemptions. A producer who believes that any commerce in coal is not, or may not be made, subject to the provisions of Section 4 may file an application for exemption with the commission."
>
> 310 U. S. 389.

The company "filed an application for exemption on the grounds that its coal was not bituminous coal as defined in Section 17(b) of the Act" (310 U. S. 390). The Commission denied the application for exemption, and this holding was affirmed by the Circuit Court of Appeals (*Sunshine Coal Co. v. National Bituminous Coal Commission,* 105 F. (2d) 559). Certiorari was denied (308 U. S. 604). Thereupon the company instituted the present action against the Collector of Internal Revenue to enjoin collection of the tax. The bill was dismissed on the merits and the plaintiff appealed. The Supreme Court in affirming the judgment of dismissal held that there was no invalid delegation of legislative or judicial power (310 U. S. 399-400). It said:

> "The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act."
>
> 310 U. S. 400.

Shields v. Utah Idaho Central R. Co. (supra.)

The Railway Labor Act does not apply to an interurban electric railway unless it is operating as a part of a general steam-railroad system. The Interstate Commerce Commission is authorized to determine after hearing whether any line operated by electric power comes within the terms of the proviso [45 U. S. C. A. Sec. 151, subsec. first]. The result is that an electric line engaged in interstate commerce but not operating as a part of a general steam-railroad system, would come under the jurisdiction of the National Labor Relations Board as to its employees. The Commission determined that the Utah Idaho Central Railroad was not an interurban railway. Thereupon, the railroad company brought an action in the Federal Court against Shields, United States District Attorney for the District of Utah, to restrain him from prosecuting any proceedings based upon an alleged violation of the Railway Labor Act. The District Court took jurisdiction, permitted the respondent to try the question *de novo*, decided that the railroad was an interurban electric railway, and granted a permanent injunction. The Circuit Court of Appeals affirmed (95 F. (2d) 911). This Court granted certiorari (304 U. S. 556).

In reversing the judgments below, this Court held:

> "The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power."

305 U. S. 181.

The court, however, examined the evidence and concluded that

> "There is no principle of law which required such a carrier to be classified as an interurban railway."
>
> 305 U. S. 187.

In the National Labor Relations Act there is no attempt at any delegation of authority to the Board to determine the meaning of the word employer and employee, unless perchance (and this we would not concede if it were in issue) such delegation is implied from the language of the Act authorizing the Board to make rules and regulations to carry out the provisions of the Act (29 U. S. C. A. Sec. 156). However, as we have pointed out heretofore (*Ante* Sec. 1-D(2), p. 12), the Board under the power thus conferred has declared that the terms shall have the meaning set forth in Section 2 of the Act (29 U. S. C. A. App. p. 561, Sec. 201.1). Accordingly, the problem resolves itself into a determination of whether or not the record discloses substantial evidence to support the finding that the newsboys are employees within the natural, legal and conventional meaning of that term.

The cases relied upon by petitioner, namely:

Walker v. Altmeyer (supra);

Gray v. Powell (supra);

South Chicago Coal & Dock Co. v. Bassett (supra);

Shields v. Utah Idaho Central R. Co. (supra);

Rochester Telephone Corp. v. U. S., 307 U. S. 125;

Sunshine Coal Co. v. Adkins (supra),

involved the application of the principle that Congress may, subject to certain safeguards, delegate to a Board legislative power to determine whether particular conditions or circumstances fall within a specified exception to or exemption from the Act. This principle would be necessary of application where it is claimed that the group under consideration are agricultural laborers or domestic servants (29 U. S. C. A. 152(3)).

In *Gray v. Powell (supra)* and *Sunshine Coal Co. v. Adkins (supra)* [Sec. 4-A of the Bituminous Coal Act of 1937 (15 U. S. C. A. Sec. 834)—see Appendix B], Congress delegated to an administrative board the power to determine whether the particular facts brought the Coal Company within the exemption. Instead of drawing a "statutory line" (310 U. S. 399) marking the limits of the exemption Congress invested the Board with power to determine "upon which side of the mediam line the particular instance falls." (314 U. S. 413.)[3]

In *Shields v. Utah Idaho Central R. Co. (supra)* the Railway Labor Act by a proviso "excepts any 'interurban' electric railway unless it is operating as a part of a general steam-railroad system" (305 U. S. 179), and the Act expressly authorized and directed the Interstate Commerce Commission "to determine after hearing whether any line operated by electric power falls within the terms of this proviso." (45 U. S. C. A., Sec. 151.)

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[3]Under the Bituminous Coal Act of 1937, a consumer who is also a producer of coal is exempted. In the *Gray* case appellees were engaged in producing coal upon leased premises through an independent contractor. The case turned largely on the distinction between the production of coal through an independent contractor and the production of coal by the consumer's "own employees" (314 U. S. 413).

In these respects the National Labor Relations Act is distinguishable from the Bituminous Coal Act of 1937 and the Railway Labor Act. In the case at bar there is no question of any exemption from or exception to the National Labor Relations Act. (See *ante* p. 19.) Respondent has consistently claimed throughout, and the opinion of the Circuit Court of Appeals is to the effect, that the controversy is not within the purview of the National Labors Relations Act because the newsboys are not employees within the meaning of the term as it is used in the Act.

There are no provisions in the Act corresponding to Section 4-A of the Bituminous Coal Act of 1937 [App. B], or to the proviso of the Railway Labor Act [App. B]. On the contrary, under Section 10 the Board's authority extends only to action concerning unfair labor practices which "'are strictly limited to those enumerated in Section 8'" (*Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 185). The only unfair labor practices listed in Section 8 are those directed against employees or, in the single instance of Section 8(3) (not here involved), to an *applicant for employment*. Under Section 7 it is only employees who are given the right to self-organization, etc.

The question of the meaning and scope of the term "employee" is exclusively a judicial function (*U. S. v. American Trucking Associations*, 310 U. S. 534, 544, quoted *supra*) and is not a legislative or administrative function delegated to the respondent Board. Accordingly, the finding of the Board that the newsboys were employees was not conclusive upon the Circuit Court of Appeals, which, as we understand the authorities, was authorized and required to examine the record for the purpose of

determining whether the Board's finding was supported by substantial evidence, and in such investigation to interpret the term employee in the light of rules of statutory interpretation, such as the Federal Courts have announced in the interpretation of the term employee in other cognate social legislation.

F. Summary of Point I.

In the last sentence of Petitioner's Brief (p. 25) preceding CONCLUSION, this summary of petitioner's position appears:

> "It is important both in the interpretation of the National Labor Relations Act and of such legislation as the Social Security Act and the Fair Labor Standards Act that the lower courts be advised whether 'employee' is to be interpreted in an enlightened manner which gives effect to the realities of economic relationships and the power of the employer or is to be given a narrow construction such as the court below applied in the case at bar."

With equal propriety reference might have been to Federal Employers' Liability Act, Fair Labor Standards Act, Federal Safety Appliance Act, Merchant Marine Act and Longshoremen's and Harbor Workers' Compensation Act. Each of these acts is like unto the National Labor Relations Act and should be, and, we believe, has been, interpreted in an enlightened manner, giving effect to the policies and the context of the Act.

As the Circuit Court of Appeals said:

> "The term 'employee' has been interpreted under several federal statutes, other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit." [R. 1848.]

Following this statement reference is made to cognate social legislation and decisions of the Federal Courts construing the term "employee" as therein used. (136 F. (2d) 608, 612 [R. 1848].)

The Fourth Specification of Error urged (Pet. p. 13 [4]) viz.,

> "4. In holding that the Board is required to follow the common law definition of employment without regard to the policies or context of the Act"

is predicated upon an incorrect conception of the rule of interpretation employed by the lower court.

Conflict of Federal Court decision is conspicuously absent in the interpretation of the term employee appearing in federal social welfare legislation. There is a line of decisions without, so far as we are able to discover, any deviation from the rule of interpretation hereinbefore set forth. The decision and opinion of the lower court in the case at bar follows this well defined line of precedent. The Ninth Circuit Court of Appeals in the case at bar declared:

> "The term 'employee' has been interpreted under several federal statutes other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit." [R. 1848.]

This language does not justify the statement of petitioners:

> "We think that the court erred in attempting to interpret 'employee' without giving any weight to the policies and purposes of the National Labor Relations Act." [Pet. p. 17.]

POINT II.

The Circuit Court of Appeals Decided That the Findings of the Board Are "Not Supported by Substantial Evidence." [R. 1851.] The Court Did Not Decide the Case Upon an Independent Consideration of the Facts, Failing to Give Any Weight to the Board's Determination (Pet. p. 13 [3]): Neither Did the Court Rule That It Was Entitled to Determine De Novo Whether or Not the Newsboys Were Employees (Pet. p. 13 [1]) as Petitioner Contends.

A. The Findings of the Board Are Conclusive Only When Supported by Substantial Evidence. More Than a Scintilla Is Required. Evidence Sufficient to Create a Suspicion of the Existence of the Fact to Be Established Is Not Adequate. Relevant Evidence Reasonably Acceptable as Adaquate to Support a Conclusion Must Appear.

1. *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300:

"Section 10(e) of the Act provides: '. . . The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred (citing cases). 'Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"

2. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229:

"The companies contend that the Court of Appeals misconceived its power to review the findings and, instead of searching the record to see if they were sustained by 'substantial' evidence, merely considered whether the record was 'wholly barren of evidence' to support them. We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence (citing authority). Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

3. *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, 476:

"The command of Sec. 10(e) of the Act that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' precludes an independent consideration of the facts."

4. *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board*, 301 U. S. 142, 147:

"The complaint is merely of error in appreciating and weighing evidence. In the case of statutory provisions like Sec. 10(e), applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence."

5. *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.* (3 C. C. A.), 135 F. (2d) 15, 25:

"It is our duty to accept as conclusive such of the Board's findings of fact as are supported by evidence (citing cases). Section 10(e) of the Act, 29 U. S. C. A. Sec. 160(e), so requires. The term 'evidence' as used in this connection means 'substantial evidence', that is, 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' (citing cases), and affords 'a substantial basis of fact from which the fact in issue can be reasonably inferred' (citing cases). While it is for the Board, therefore, to find the facts and to draw material inferences from the evidence (citing cases), it is for a reviewing court to say whether the Board's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence which it accredits. Guided by these standards, it is our opinion that the Board's findings of unfair labor practices on the part of the respondent are not supported by substantial evidence."

B. From the Opinion of the Circuit Court of Appeals It Is Manifest That the Question Considered Was: Is the Finding of the Board Supported by Substantial Evidence.

1. EXCERPTS FROM OPINION:

(a) "The question for decision as to each newspaper separate from any other paper is whether there is substantial evidence * * * to support the Board's decision that they were employees under Section 2 (3) of the National Labor Relations Act." [R. 1849-1850.]

(b) "* * * we believe * * * that there is not substantial evidence herein to support the Board's determination that the newsboys are 'employees' of the publishers * * *." [R. 1850.]

(c) "We think the Board is not supported by substantial evidence in its finding that the 'newsboys' are employees of the publisher whose newspaper they vend." [R. 1851.]

C. Summary of Point II.

The quotations immediately preceding indicate that the court examined the record for the purpose of determining whether it contained substantial evidence to sustain the Board's finding. Discovering no substantial evidence the court had no alternative other than to set aside the order.

The third specification of error, viz.,

> "The Circuit Court of Appeals erred:
>
> * * * 3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that newsboys are employees within the meaning of the Act." (Pet. p. 13.)

assigns to the court an avenue of approach which it did not follow. If petitioner contends that the findings of the Board are supported by substantial evidence, the specification of error should have been, in effect at least, that the court erred:

> In holding that the finding of the Board (that the newsboys are employees of the publisher whose newspaper they vend) is not supported by substantial evidence.

POINT III.

Consideration of Specifications of Errors Assigned.

A. Petitioner Contends That the Circuit Court of Appeals Erred (Pet. p. 13).

"1. In holding that the Board's denial of respondent's claim of exemption from the statute was improper."

Respondent contends that the court did not so hold. This respondent and, so far as we are informed, respondents in the other three cases made no claim of exemption. Respondent contends that the news vendors are not employees within the meaning of that term of the Act. The Board was without jurisdiction because the news vendors are not employees. As we understand, an exemption applies to employees working "as an agricultural laborer or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse." (29 U. S. C. A., Sec. 152[3].) Accordingly, exemptions apply to certain classes of employees.

"2. In holding that the newsboys are 'independent contractors'."

The court did not hold that the newsboys are independent contractors. The court held that the finding of the Board that the newsboys are employees is not supported by substantial evidence [R. 1851]. The issue before the Board was whether or not the newsboys were employees of the respondents. If they are not employees, it may or may not follow that they are independent contractors. The term "employee" must be considered as it is used in the National Labor Relations Act. A consideration of whether the newsboys are independent contractors will lead us far afield.

"3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that newsboys are employees within the meaning of the Act." [Pet. p. 13.]

This assignment is considered *ante* under Point II, B, pages 25 and 26.

"4. In holding that the Board is required to follow the common law definition of employment without regard to the policies or context of the Act." [Pet. p. 13.]

This matter is considered *ante* under Point I, page 22.

"5. In failing to hold that the relationship involved herein is a personal service relationship which, even under common law standards, clothes the newsboys with employee status." [Pet. p. 13.]

This assignment is developed in the petition, pages 23 and 24. There it is contended that the court "seems to have given undue weight to the fact that, as persons not working on respondent's premises, their activities were not controlled to the same extent as are those of inside workers and to the fact that the transactions took the form of a sale." This respondent is not aware that the court gave any consideration to the fact that the newsboys were working either within or without the premises. Petitioner's contention and authorities cited in support thereof appear to be without any application. The fact that the transactions took the form of a sale is one of a series of criteria disclosed by the record and referred to by the court. A reading of the single paragraph of the opinion where a summary of such criteria appears [R. 1850-1851] indicates that it is one of many.

POINT IV.

Consideration of Petitioner's Statement.

To the statement of petitioner we take exception. There are four entirely separate and distinct cases here involved. In the taking of evidence before the Board the cases were considered separately, and there are many stipulations in the record to this effect. Counsel for the Board, however, throughout in their briefs and in the pending petition insist on weaving the evidence of all four cases into one pattern. Although in many instances counsel for petitioner have painstakingly cited record references applicable to each petitioner, diligent checking of these references relating to the petitioner Los Angeles Times discloses that in some instances the record is precisely to the contrary of petitioner's statement, and in other instances the record does not support the context.[4]

The statement of petitioner is inaccurate in the sense of incomplete in that it omits a recital of important admitted facts which the Board in another newsboys' case[5] decided the same date considered controlling of the issue. Such facts are

1. The newsboys are not carried on the Los Angeles Times' payroll [R. 1343].

2. The newsboys receive no money or other thing of value from the Times for selling its newspapers R. 1294].

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[4]Illustrations in support of this statement may be found in Appendix A.

[5]*Matter of Houston Chronicle Publishing Co.*, 28 NLRB 1043; footnote (3), 1046.

3. The newsboys are not registered as employees with the Social Security Board [R. 1344].

4. The newsboys are not covered by Workmen's Compensation insurance carried by the Los Angeles Times on its employees [R. 1344].

5. The Los Angeles Times kept no list of the names of newsboys selling its papers or the locations where they operated [R. 1149, 1153-1154, 1295-1296].

6. The newsboys take the risk of lost, destroyed or stolen papers or papers sold by them on credit [R. 1194-1195].

7. The newsboys sell other local competing newspapers and periodicals [R. 1260-1269].

Perhaps we may be justified in also pointing out that the Board (Regional Director) found that 457 newsboys engaged in street sales of the Los Angeles Times were eligible to vote in the election [R. 191]; that the Board in finding that these 457 newsboys were Times' employees relied on the testimony of only 5 witnesses. These witnesses testified concerning their individual and personal dealings and of isolated occurrences not arising to the dignity of a general or uniform practice. They are:

1. Roy Eley [R. 1181-1211];
2. John Roberts [R. 1211-1243];
3. Philip Tellis [R. 1243-1249];
4. John Fields [R. 1249-1280, 1328-1342];
5. Edward Patch [R. 1313-1328].

The testimony given by these 5 Times' newsboys upon which the Board made its finding embracing 452 additional newsboys, relates for the most part to the individual experiences of each of the 5. There is nothing in the evidence to justify a finding that such was the common experience of all or of any considerable number or that such experiences were typical of the relations between the Times and the remaining 452 newsboys. This circumstance was raised before the trial examiner, who, upon inquiry from the chief trial examiner at Washington, was advised by wire:

> "'Evidence should be introduced to show that persons signing cards are employees. Burden is on Petitioner to show this fact. I assume Respondent denies card signers occupy position of employees. If so, evidence should be introduced to show what each individual does * * *.'" [R. 1493.][6]

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[6]Following the receipt of this wire the following colloquy occurred between counsel for the Board and the trial examiner:

"Mr. Mouritsen: Let me then understand what the Trial Examiner's idea is on what further evidence should be put in, or the type of evidence.

Trial Examiner Kennedy: Evidence should be introduced to show what each individual does. Now, I do not think that has been done." [R. 1513.]

Conclusion.

Petitioner has shown no sufficient ground for writ of certiorari. The principal grounds (as we understand) relied upon are:

1. A conflict of decision between *Walker v. Alimeyer (supra)* and *Gray v. Powell (supra)* on the one hand and, on the other, the decision of the Circuit Court of Appeals, Ninth Circuit, in the case at bar, and

2. The failure of the Circuit Court of Appeals, Ninth Circuit, in the case at bar in interpreting the word employee to give any weight to the policies and purposes of the National Labor Relations Act.

These contentions we believe to be without merit.

This case is not one of general importance. No matter of general interest to the public is involved. The petition should be denied.

Fields v. United States, 205 U. S. 292, 296.

Respectfully submitted,

T. B. COSGROVE,

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Attorneys for Respondent The Times-Mirror Co.

APPENDIX A.

Illustrations of Incorrect or Inaccurate Suggestions of Fact in Petitioner's Statement:

1. "The district managers keep lists of the newsboys in their districts, the locations where they are stationed, the quota assigned to each boy * * * [Times R. 504-521; * * *]."

[Pet. p. 6.]

The foregoing statement relates to an important matter. The statement is incorrect with reference to the Los Angeles Times. The record, pp. 504-521, contains a list of Los Angeles Times' hustlers (newsboys) and the corners where they operate, but the record at pp. 1149, 1153-1154, 1295-1296, discloses that at the commencement of the hearing the Los Angeles Times had no such list but at the request of counsel for the Board and to expedite the presentation of the Board's case the Times' attorneys suggested to the executives of the Times that such a list be prepared, and accordingly this was done. In the Board's brief filed with the Circuit Court of Appeals, this same erroneous statement appeared, and the error of the statement was there pointed out in the petitioner's reply brief.

2. "The district managers keep lists of the newsboys in their districts * * * the names of the checkman or 'main spot' boys through whom they distribute and the amounts so subdistributed (* * * Times R. 504-521 * * *)."

[Pet. p. 6.]

"Checkmen both receive papers for themselves and also for distribution to other newsboys in the vicinity."

[Pet. p. 6, Note 3.]

The record reference in the above quotation, as explained in the preceding paragraph relates to a list of names and locations. There is no reference at pages 504-521 or elsewhere to Los Angeles Times' checkmen. The record discloses that the Los Angeles Times had no checkmen [R. 90, footnote 18]. This circumstance was admitted by the Board in its briefs before the Circuit Court of Appeals [Br. 19].

3. "The checkman and newsboys regard themselves as employees [R. 820, 825, 853, 871, 893-894, 898, 1464], were so regarded by representatives of respondents [R. 585, 696, 717, 802, 820, 1116, 900, 1122, 1332, 1484], and by the public [R. 746-747, 969-972, 1040, 1122-1123]." [Pet. pp. 11-12.]

In this series of record references there is but one, viz., 1332, that refers to the Los Angeles Times. The record at page 1332 falls short of sustaining the context.

This statement illustrates how easily one may receive an incorrect impression of the record as to one of the respondents when the evidence in all four cases (despite the splendid industry and ability of counsel) is woven into one pattern.

4. "The newsboys are 'hired' and 'fired', disciplined, directed, and supervised (see pp. 8-10 *infra*) by respondents through supervisory employees known as the 'district manager' or the 'district man' [* * * Times R. 1156; * * *]."

[Pet. p. 6.]

The record reference above given is confined to an identification of the term district man. Turning to pp. 8-10 of the Petition we encounter a large number of record references, a summary of all of which may not be justified here. We think they do not sustain the charge of hiring, firing and disciplining. The matter is illustrated by statement in the Petition, p. 8. There it is said:

"The newsboys are subject to removal at will and to transfer or disciplinary lay-offs by the district managers * * *."

The right of the respondent to decline to have further relations with the newsboys and to refuse to further deal with them we think is a fair interpretation of the testimony. An exercise of such right is consistent with a partnership status or that of independent contractors.

APPENDIX B.

Excerpt from Section 4-A of the Bituminous Coal Act of 1937 (15 U. S. C. A., Sec. 834, second paragraph) involved in *Gray v. Powell*, 314 U. S. 402, and *Sunshine Coal Co. v. Adkins*, 310 U. S. 381:

"Any producer believing that any commerce in coal is not subject to the provisions of sections 831, 832 and 833 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by sections 831, 832 and 833 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the subchapter with respect to commerce in coal properly subject to the provisions of sections 831, 832 and 833 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part

of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 836. April 26, 1937, c. 127, Sec. 4-A; 50 Stat. 83."

Excerpt from the Railway Labor Act (45 U. S. C. A., Sec. 151, subd. first) involved in *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177:

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to chapter 1 of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however*, That the term 'carrier' shall not include any street, interurban, or suburban electric

railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities."